

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 08 2002
Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE CITY OF TULSA,
THE TULSA METROPOLITAN
UTILITY AUTHORITY,

Plaintiffs,

v.

Case No. 01-CV-09002(C) ✓

TYSON FOODS, INC.,
COBB-VANTRESS, INC.,
PETERSON FARMS, INC.,
SIMMONS FOODS, INC.,
CARGILL, INC.,
GEORGE'S, INC.,
CITY OF DECATUR, ARKANSAS,

Defendants.

Motion of
**SEPARATE DEFENDANT CARGILL INC.'S
and BRIEF IN SUPPORT OF SUPPLEMENTAL MOTION FOR
PARTIAL SUMMARY JUDGMENT**

COMES NOW Separate Defendant Cargill, Inc. (hereinafter "Cargill"), and files this Brief in Support of its Supplemental Motion for Partial Summary Judgment, solely as to Plaintiffs' claim of nuisance.

INTRODUCTION

To maintain an action for nuisance, a party must own the property that is subject to the alleged nuisance. Plaintiffs cannot present proof that they are the owners of the property that is subject to the alleged nuisance. The State of Oklahoma owns the property at issue in Plaintiffs' nuisance claim, and Plaintiff City of Tulsa is a mere licensee of a portion of that property. Accordingly, Cargill is entitled to summary judgment as to Plaintiffs' claim for nuisance, and for Plaintiffs' claim for joint and several liability as to nuisance.

EXHIBIT

3

STATEMENT OF UNDISPUTED FACTS RELEVANT TO THIS MOTION

1. Cargill, Inc., contracts with independent growers for the raising of poultry. Amended Complaint ¶18; Deposition of Deryle Oxford, May 16, 2002, pp. 14, 88 (Exhibit A).
2. Cargill's contract growers raise poultry on farms owned by the growers. *Id.* at pp. 14, 88, 192.
3. The City of Tulsa asserts in its Amended Complaint that Cargill has caused pollution to the Eucha/Spavinaw watershed, in the form of nutrients that enter streams and tributaries of Spavinaw Creek, as subsequently collected in Lakes Eucha and Spavinaw. Amended Complaint ¶¶ 15, 16, 19, 20, and 21.
4. The Amended Complaint claims a cause of action for nuisance because of alleged pollution by nutrients. Amended Complaint ¶¶ 47-52.
5. The City of Tulsa has a license from the State of Oklahoma to use a defined portion of the waters of Spavinaw Creek. (Permit, Grant, License and Certificate, Oklahoma Planning and Resources Board, *In the Matter of the Application (Amended) and Supplemented, By the City of Tulsa, a Municipal Corporation, For Appropriation of the Waters of Spavinaw Creek*, No. 22-33, August 9, 1938) (Exhibit "B").
6. Plaintiffs are not the owner of the waters of Spavinaw Creek. *Id.*; *City of Tulsa v. Grand-Hydro*, Case No. 5263, District Court of Mayes County, State of Oklahoma, February 10, 1938 (Exhibit "C").

APPLICABLE LAW

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate when “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.”ⁱ

ARGUMENT

I. The Conduct of Cargill’s Contract Growers With Respect to Raising Poultry Does Not Constitute a Nuisance Pursuant to Oklahoma Statute

Oklahoma law defines the raising of poultry as an agricultural activity. 50 O.S. §

1.1. Agricultural activities are specifically exempt from Oklahoma’s nuisance law if the activities are performed in a manner that does not have a substantial adverse effect on the public health and safety:

Agricultural activities conducted on farm or ranch land, if consistent with good agricultural practices and established prior to nearby nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety.

If that agricultural activity is undertaken in conformity with federal, state and local laws and regulations, it is presumed to be good agricultural practice and not adversely affecting the public health and safety.

50 O.S. § 1.1(B). Cargill’s contract growers raise turkeys on farm land. There is no allegation that the contract growers do not utilize good agricultural practices. Under these facts, Cargill’s contract growers’ agricultural activities “are presumed to be reasonable and do not constitute a nuisance.”

The statute excepts from its protection from nuisance suits only those agricultural activities that have “a substantial adverse effect on the public health and safety.”

Plaintiffs do not allege in the Amended Complaint that the public health and safety is endangered by any action of Cargill or its contract growers.

Furthermore, there is no allegation that Cargill's contract growers are not in conformity with federal, state and local laws and regulations. Without evidence of non-conformity, Cargill's contract growers are presumed by statute to be engaging in "good agricultural practice" and are not "adversely affecting the public health and safety," and thus, their poultry operations cannot constitute a nuisance.

II. Plaintiffs Cannot State a Cause of Action for Nuisance Because Plaintiffs Do Not Have the Requisite Interest In Property

A. The State Of Oklahoma Is the Owner of Spavinaw Creek, and Thereby, the Water That Flows Into Lakes Eucha and Spavinaw

Neither Plaintiff owns the water in Lake Eucha or Lake Spavinaw. The City of Tulsa has permission from the State of Oklahoma to take a certain quantity of water from Spavinaw Creek. The City filed an application with the Oklahoma Planning and Resources Board on May 11, 1922, as amended August 5, 1922, March 23, 1932, and June 13, 1938. (Permit, Grant, License and Certificate, Oklahoma Planning and Resources Board, *In the Matter of the Application (Amended) and Supplemented, By the City of Tulsa, a Municipal Corporation, For Appropriation of the Waters of Spavinaw Creek*, No. 22-33, August 9, 1938)(Exhibit "A")

The City's initial application was to "appropriate the minimum flow" of Spavinaw Creek, and the subsequent amendments expanded the City's request to include "the entire flow of said creek for municipal purposes" and "the excess flow of Spavinaw Creek" for future needs. *City of Tulsa v. Grand-Hydro*, Case No. 5263, District Court of Mayes County, State of Oklahoma, February 10, 1938 at ¶ 1, p. ATK2084 (Exhibit "B"). The City's applications were granted. *Id*; *see also* Permit, Grant, License and Certificate (reciting history of the construction of Spavinaw reservoir, waterworks and water conduit

to Tulsa) The specific rights of the City of Tulsa to the waters of Spavinaw Creek are as follows:

IT IS ORDERED AND DECLARED That ... PERMIT, GRANT, LICENSE AND CERTIFICATE is hereby issued to it, its successors, and a grant is made to it, and it is hereby given permission to use and apply forty five cubic second feet of the run-off or flow of said Spavinaw Creek for present needs and necessities for municipal waterworks or supply purposes and such further uses authorized by law...

Id. The Permit, Grant, License and Certificate further finds the City entitled to 205 cubic second feet of Spavinaw Creek for future anticipated needs, "leaving only unappropriated water and water subject to appropriation in the future in said stream system of Spavinaw Creek one hundred fifty-five cubic second feet." *Id.*

The terms used by the Oklahoma Planning and Resources Board are unequivocal: the City was granted license to utilize a certain portion of the flow of Spavinaw Creek. Title and ownership of the water itself did not transfer—only the right to use the water was transferred from the State of Oklahoma.

B. Plaintiffs Cannot State a Claim for Nuisance Because They Do Not Own the Property Subject to the Alleged Nuisance

"A nuisance, public or private, arises where a person uses his own property in such a manner as to cause injury to the property of another." *Fairlawn Cemetery Ass'n v. First Presbyterian Church*, 496 P.2d 1185 (Okla. 1972). Plaintiffs are not the owners of the waters of Spavinaw Creek; they are simply licensees of the State of Oklahoma.

As mere licensees, Plaintiffs cannot enforce the rights of a property owner that is subject to an alleged nuisance.

The statutory definition of nuisance --in 50 O.S.1991 §§ 1 et seq.-- encompasses the common law's private and public nuisance concepts. It abrogates neither action. Common-law nuisance --a field of tort-like liability which allows recovery of damages for wrongful interference with

the use or enjoyment of rights or interests in land-- affords the means of recovery for damage incidental to the land possessor's person or chattel.

Nichols v. Mid-Continent Pipe Line Co., 933 P.2d 272 (Okla. 1996). The State of Oklahoma is the "possessor" in this case, with the City a licensee for a particular portion of the State's property. The action of nuisance is the "means of recovery for damage incidental" to the property of the State of Oklahoma.

As discussed in the joint Motion for Summary Judgment of the Poultry Defendants, Plaintiffs cannot recover under nuisance for claims of personal injury, such as annoyance and discomfort, because those types of damage can only be suffered by people, not corporate or government entities. Corporate or government entities can only recover for damage to their property. "*Tytenicz, Eylar, Kiser, Slape, and Lowe*, make inescapable the conclusion that the cause of action for inconvenience, annoyance, and discomfort is one for personal injury and is separate and distinct than the cause of action for damages to property, although the right to both may arise in a suit for nuisance."

Truelock v. Del City, 967 P.2d 1183 (Okla. 1998).

C. As Licensees, Plaintiffs Can Only Claim that Cargill Has Interfered With the City's Right To Take Its Assigned Quantity of Water, a Claim That Plaintiffs Do Not Allege

The terms of the City's license with the State do not include provisions relating to any aspect of water other than quantity. Because the license is silent as to issues such as warranties of water quality or clarity, Plaintiffs cannot argue that any contractual rights are injured by virtue of the alleged nuisance. Plaintiff City of Tulsa has a license to use a fixed quantity of water, and Plaintiffs do not allege that Cargill has done any act to interfere with the City's taking of its fixed quantity of water. Thus, even if Plaintiffs could sustain a nuisance claim as to property that they do not own, Plaintiffs can allege

only that harm commensurate with the City's license to utilize water as licensed by the State.

CONCLUSION

Plaintiffs allege numerous causes of action with respect to their basic complaint: the water they take from Lakes Eucha and Spavinaw has more algae in it than usual. Plaintiffs' allegation of nuisance against Cargill fails for multiple reasons. The agricultural practices of Cargill's contract growers are protected from nuisance claims by statute. Furthermore, Plaintiffs do not have the right to assert an action for nuisance to property that is not theirs.

WHEREFORE Defendant Cargill, Inc. respectfully requests that the Court grant summary judgment to Cargill, Inc. as to Plaintiffs' claim for nuisance, and for Plaintiffs' claim for joint and several liability as to nuisance, and for such other relief as the Court finds appropriate.

¹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *LMS Holding Co. v. CoreMark Mid-Continent, Inc.*, 50 F.3d 1520, 1523 (10th Cir. 1995). Indeed, the purpose of the summary judgment rule is to determine whether trial is necessary; thus the non-moving party must at a minimum direct the court to facts which establish a genuine issue for trial. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). In *Celotex*, the Supreme Court stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 317. To survive a motion for summary judgment, the nonmovant must establish that there is a genuine issue of material fact, but he also "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matusushita v. Zenith*, 475 U.S. 574, 585 (1986).

With respect to Rule 56 motions, the Tenth Circuit Court of Appeals has stated:

Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination We view the evidence in a light most favorable to the nonmovant; however, it is not

enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.'

A movant is not required to provide evidence negating an opponent's claim Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in the possession of the movant.

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992) (citations omitted). Thus, if the non-moving party fails to set forth specific facts showing a genuine issue for trial, the moving party is entitled to judgment as a matter of law, and the court's grant of summary judgment will not be disturbed on appeal. *Devery Implement Co. v. J.I. Case Co.*, 944 F.2d 724, 726-27 (10th Cir. 1991).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of November, 2002, mailed a true and correct copy of the above and foregoing document with proper postage prepaid thereon to:

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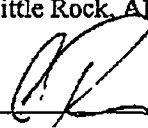
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EXHIBIT

A

**Transcript of the Testimony of
Deryle Oxford**

Date: May 16, 2002
Volume: I

Case: City of Tulsa v. Tyson, et al.
01-CV-0900B(X)

COPY

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Deryle Oxford

City of Tulsa v. Tyson, et al.

5/16/2002

14

1 A I communicated with a Tim Alsup.

2 Q All right. Tim Alsup.

3 What does Tim Alsup do for Cargill, Inc.?

4 A He has worked with the producers in the
5 past, but currently works a lot like Tim Mothen,
6 except in the northwest Arkansas area.

7 Q All right.

8 A But he was more importantly responsible for
9 putting together much of the information that we
10 needed for this, for your request.

11 Q Okay. Mr. Alsup helped pull together some
12 documents that Cargill, Inc. produced to the
13 plaintiffs in this lawsuit?

14 A Yes, sir.

15 Q You said that Mr. Alsup used to work with
16 the producers, quote-unquote?

17 A Yes, sir.

18 Q What -- when you use the word "producers",
19 what are you referring to?

20 A The people that grow the turkeys.

21 Q All right.

22 A The independent farmers.

23 Q Okay. Mr. Alsup was some kind of supervisor
24 there with the independent growers?

25 A That's what we call grow-out manager.

Deryle Oxford

City of Tulsa v. Tyson, et al.

5/16/2002

88

1 Q All right. Is that written down somewhere
2 what your minimum requirements are?

3 A In some locations it's written down. I -- I
4 don't think it is in all locations.

5 Q How about your location? Do you have --
6 you're the supervisor. Do you have a book or
7 something that writes down kind of generally what
8 you're expecting the farmer to -- to invest in the
9 operation as time goes along? Are you following what
10 I'm saying?

11 A We don't have an estimate of how much he
12 should invest as time goes on.

13 Q Do you have a minimum requirement as time
14 goes on?

15 A No, sir. Just to have the houses maintained
16 at a certain level.

17 Q If the farmer wants to sell his farm to
18 another grower, is that normally what happens, if
19 they want to get out of the business? They want to
20 sell it to some other grower?

21 A Certainly.

22 Q Okay. And how does that process work? Do
23 they contact you and say, I want to sell my farm to
24 Johnny Jones?

25 A It happens in all sorts of ways. Sometimes

Deryle Oxford

City of Tulsa v. Tyson, et al.

5/16/2002

192

1 with the litter, why Cargill, Inc. wouldn't do that?

2 Is that a bad question? Do you want me to start --

3 A It was a long one, but --

4 Q Yeah, I'm bad at that. Let me start over.

5 Cargill, Inc. dictates a lot of specific
6 requirements to contract growers, does it not? Do
7 you agree with that?

8 A In the management of their farm?

9 Q Yes.

10 A I don't know that I agree with you on that.

11 Q Really? You don't -- you don't think that
12 the contract and the way the process is set up is set
13 up --

14 A Those -- that doesn't affect the way they
15 manage their farms.

16 Q The requirements in the contract, what they
17 have to do, the weekly visitations by Cargill, does
18 not affect the management of the farm?

19 A The weekly -- the weekly visitation is not
20 something we ask the grower to do.

21 Q I understand, but don't you make
22 requirements of those growers when you see things
23 that are wrong?

24 A We only make requirements whenever we think
25 that it's going to affect the residues, the rules

EXHIBIT

B

PROCEEDINGS IN APPLICATION
FOR
SPAVINAW WATER RIGHTS

ATK 2074

BEFORE THE OKLAHOMA PLANNING AND RESOURCES BOARD OF THE
STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION (AS AMENDED)
AND SUPPLEMENTED, BY THE CITY OF TULSA, A
MUNICIPAL CORPORATION, FOR APPROPRIATION OF THE
WATERS OF SPAVINAW CREEK. } No. 22-33.

PERMIT, GRANT LICENSE AND CERTIFICATE

On the 9th day of August, A.D. 1938, there came on for hearing and consideration before the Oklahoma Planning and Resources Board of the State of Oklahoma (hereinafter referred to as Commission) at its offices in the State Capitol Building, in Oklahoma City, Oklahoma, the original application of the City of Tulsa, a municipal corporation, filed in the office of the State Engineer, Department of Highways of the State of Oklahoma, on May 11, 1922, and the amended application of said City of Tulsa filed in the same office on August 5, 1922, to which amended application there was appended maps, plans, etc., illustrating the nature of the proposed waterworks to be constructed by said City in its appropriation of the waters of Spavinaw Creek in Oklahoma for municipal waterworks or supply purposes and, the supplemental application of said City filed in the office of the Conservation Commission of the State of Oklahoma on March 23, 1932, and the amendment of said City to said application filed with said Commission on June 13, 1938, all pursuant to and by virtue of the provisions of Chapter 70 of the Oklahoma Statutes 1931 (being Chapter 40, Volume 1; Revised Laws of Oklahoma 1910), and Chapter 119, House Bill No. 63, Session Laws of Oklahoma 1923-1924 (being Sections 6056 to 6059 both inclusive, Oklahoma Statutes 1931), and the said City of Tulsa appearing by H. O. Bland, City Attorney, Harve N. Langley, special assistant to said City Attorney, and W. F. Graham, Water Commissioner of said City, and, whereupon, the said Commission ordered a continuance of said hearing of said matter to September 13, 1938, at 10 o'clock A.M., and further ordered the giving of notice of said hearing on said application, as amended and supplemented, to the Grand River Dam Authority, the Grand-Hydro, a corporation, The City of Muskogee, The City of Wagoner, the City of Pryor Creek, the Town of Ft. Gibson, The Oklahoma Hydro-Electric Company, a corporation, T. C. Bowling, Cedar Crest Lakes, an Oklahoma Express Trust, the City of Vinita, and the City of Miami.

NOW, on this 13th day of September, 1938, at the hour of ten o'clock A.M., at the offices of said Commission, in the State Capitol Building, in Oklahoma City, Oklahoma, the aforesaid application, as amended and supplemented as stated hereinbefore, comes on for hearing and consideration before said Commission, the said City of Tulsa again appearing by H. O. Bland, City Attorney, Harve N. Langley, special assistant to said City Attorney, and W. F. Graham, Water Commissioner of said City, and no person, firm or corporation or municipal corporation appearing in opposition to the granting of said application as amended and supplemented.

Thereupon, the said City of Tulsa files with said Commission due and sufficient proof of the service of the notice issued by said Commission on August 9th, 1938, upon each of the following: The Grand River Dam Authority, The Grand-Hydro, a corporation; The City of Muskogee, The City of Wagoner, The City of Pryor Creek, The Town of Fort Gibson, The Oklahoma Hydro-Electric Company, a corporation, T. G. Bowling, Cedar Creek Lakes, an Oklahoma express trust, The City of Vinita, and the City of Miami, and which service of notice, the said Commission doth approve and declare sufficient.

WHEREUPON, The City of Tulsa, a municipal corporation, submits evidence in support of its said application as amended and supplemented, and, from which evidence, the said Commission finds and declares and adjudges:

(1) That pursuant to the amended application aforementioned filed on August 5th, 1922, The State Engineer, Department of Highways of the State of Oklahoma on the 18th of August, 1922, issued notice of hearing of said amended application, and, which notice was duly published in a newspaper printed in and of general circulation in the stream area, namely, Mayes County Democrat, a weekly newspaper published in the City of Pryor, Oklahoma, in the issues of said newspaper published on dates, i.e., September 14, 1922, and continuing weekly, the last publication being on October 12, 1922, and due proof of such publication filed with said State Engineer immediately upon completion of the last such publication; and, on October 18, 1922, at ten o'clock A.M., at the office of the said State Engineer, in the said State Capitol Building, said application as amended was heard, and the said City of Tulsa submitted evidence, and its specifications and plans for the construction of the works proposed; and by said amended application said City sought to appropriate and did appropriate forty-five cubic second feet of the run-off or flow of said Spavinaw Creek for municipal waterworks or

supply purposes; and, said State Engineer took under consideration said application as amended until the 28th of November, 1922, when he endorsed on the upper right hand corner of the first page of said amended application the following: "Approved for entire flow: 11/28/1922. Max L. Cunningham, State Engr."

Thereupon, in diligent manner, pursuant to such approval of said application as amended, and said appropriation, and in keeping with the maps, plans and specifications so submitted, said City of Tulsa did actually, as a matter of fact, and as a matter of record, appropriate and apply to beneficial uses, i.e., municipal waterworks or supply purposes forty-five cubic second feet of the run-off or flow of said Spavinaw Creek, beginning in the month of April, 1924, after its construction of the proposed works consisting of a dam of reinforced concrete and concrete core-wall located in Section fifteen, Township Twenty-two North, Range twenty-one East of the Indian Base and Meridian, in Mayes County, Oklahoma, said point being definitely located on the map appended to said amended application, which dam raised the elevation of the water from six hundred thirty feet above sea level to the impounded elevation of six hundred eighty feet above sea level, thereby inducing a gravity flow through a reinforced concrete conduit from the point of said dam to a point near the City of Tulsa; and at said latter point said City constructed an emergency storage reservoir, and other appendages and incidents necessary to the plan of the proposed works, and, said City of Tulsa has, for such beneficial purposes, continuously since April, 1924, been diverting and actually applying to such uses, the said appropriated quantity of the run-off or flow of said Spavinaw Creek, i.e., forty-five cubic second feet.

That on March 23, 1932, said City of Tulsa filed with the Conservation Commission of the State of Oklahoma, its supplement to said application for the appropriation of the unappropriated waters of said Creek for such beneficial purposes and uses, pursuant to the provisions of Chapter 119, House Bill No. 63, Session Laws of Oklahoma 1923-24 (being Sections 6056 to 6059, both inclusive, of Oklahoma Statutes 1931) for its future needs and necessities; and, on June 13th, 1938, said City filed a supplement to said application for appropriation for its said future needs and necessities for such purposes of two hundred five cubic second feet of the run-off or flow of said Spavinaw Creek.

That subsequent to March 23, 1932, the Conservation Commission of the State of Oklahoma and this Commission caused to be conducted, and did conduct and complete an hydrographic survey of said Spavinaw Creek and of Grand River in Oklahoma, by which said survey it was accurately determined and recorded the run-off or flow of said Spavinaw Creek.

That on February 14, 1938, the District Court of Mayes County, Oklahoma, in an action entitled: The City of Tulsa, a municipal corporation, plaintiff, versus Grand-Hydro, a corporation, and others, defendants, did render judgment adjudging the run-off or flow of said Spavinaw Creek to be four hundred five cubic second feet, and did further adjudge said Spavinaw Creek to be a separate stream system, and did further adjudge that no person, firm, or corporation, or municipal corporation, save the City of Tulsa, had applied for permit, grant license or certificate to appropriate the waters of said creek to beneficial uses and/or had actually applied the waters of said Spavinaw Creek or any part thereof to beneficial uses.

That on June 13, 1938, the Oklahoma Planning and Resources Board of the State of Oklahoma, issued notice of the hearing of said application, as amended and supplemented as aforesaid of said City of Tulsa, and which said notice was duly published in the Delaware County Journal, published at Jay, the county seat of Delaware County, Oklahoma, being a newspaper published weekly and of general circulation and printed in the stream area of Spavinaw Creek and which said notice was published in the issues of said newspaper to-wit, June 30, 1938, July 7th, July 14th, and July 21, 1938, and due and sufficient proof of said publication filed with said Commission on August 9, 1938.

That the run-off or flow of said Spavinaw Creek as disclosed by said hydrographic survey and the judgment of said District Court, and as a matter of fact, is four hundred five cubic second feet.

The said Spavinaw Creek has its source in Arkansas, and flows through Delaware County, Oklahoma, into Mayes County, Oklahoma, where it empties into Grand River.

That the City of Tulsa, a municipal corporation, is first in point of time in filing application for the appropriation of said forty-five cubic second feet for such uses for present needs, and is first in point of time in filing application for the appropriation of two hundred five cubic second feet for its future needs and necessities for such purposes.

That the City of Tulsa, a municipal corporation, diligently pursued and prosecuted its said application as amended and supplemented as aforesaid, and diligently constructed the works in connection therewith as proposed, and diligently applied the appropriated forty-five cubic second feet of the run-off or flow of said Spavinaw Creek to such uses for present needs and necessities, and, that the works constructed as aforementioned are in accordance with its said plans and specifications, and in keeping with standard engineering, and the same is safe, and should be approved by this Commission, and certificate of completion thereof issued by this Commission.

That to meet the future needs and necessities of said City of Tulsa, it is necessary that said City appropriate in addition to said forty-five cubic second feet of the run-off of said Spavinaw Creek now being actually applied to such uses, two hundred five cubic second feet, for the aforesaid beneficial uses, and that said two hundred five cubic second feet of the run-off or flow of said Spavinaw Creek should be by this Commission or Board set aside as a reserve for said City of Tulsa to be used and applied when needed by said City of Tulsa for such uses.

And, the Oklahoma Planning and Resources Board of the State of Oklahoma, hereinbefore referred to as Commission and Board, being fully informed in the premises:

IT IS ORDERED AND DECLARED That all things have been done, performed, and happened required by law and the rules of said Board by the City of Tulsa in its appropriation of forty-five cubic second feet of the run-off or flow of said Spavinaw Creek for aforementioned purposes, and PERMIT, GRANT, LICENSE AND CERTIFICATE is hereby issued to it, its successors, and a grant is made to it, and it is hereby given permission to use and apply forty five cubic second feet of the run-off or flow of said Spavinaw Creek for present needs and necessities for municipal waterworks or supply purposes and such further uses authorized by law now existing or hereafter enacted, and the aforementioned works in connection with such appropriation by it constructed and is hereby approved, and declared safe, and declared constructed according to standard engineering, and certification of completion of such works is hereby issued.

IT IS ORDERED AND FURTHER DECLARED That all things have been done, performed and happened required by law and the rules of said Board

by the said City of Tulsa in its appropriation of two hundred five cubic second feet of the run-off or flow of Spavinaw Creek to be by it used and applied in the future to meet its anticipated future needs for such purposes i.e., municipal waterworks or supply purposes and such further uses authorized by law now existing or hereafter enacted, and, said quantity of the run-off or flow of said creek is hereby set apart and reserved for said City of Tulsa for such uses in the future, and permit, grant, license, is hereby issued to said City of Tulsa for such purposes of such quantity of the run-off or flow of said Spavinaw Creek for such future needs and necessities, leaving only unappropriated water and water subject to appropriation in the future in said stream system of Spavinaw Creek one hundred fifty-five cubic second feet.

IT IS ORDERED AND FURTHER DECLARED That the appropriation by the City of Tulsa of the aforesaid two hundred fifty cubic second feet is superior and prior to the Grand River Dam Authority, The Grand-Hydra, a corporation, The City of Muskogee, The City of Wagoner, The City of Pryor Creek, The Town of Fort Gibson, The Oklahoma Hydro-Electric Company, T. C. Bowling, Cedar Crest Lakes, The City of Vinita, and the City of Miami.

WITNESS the Oklahoma Planning and Resources Board of the State of Oklahoma, by its Chairman and Secretary, with the Seal of said Board affixed, at its offices in the State Capitol Building in Oklahoma City, Oklahoma, this thirteenth day of September, A.D. 1938.

THE OKLAHOMA PLANNING AND RESOURCES
BOARD OF THE STATE OF OKLAHOMA.

BY */s/ L. W. Archibald*
Vice-Chairman

ATTEST:

T. G. Gamble
Secretary

(SEAL)

CERTIFICATE OF TRUE COPY OF ORIGINAL

United States of America:	0
	}
State of Oklahoma	0
	}
Oklahoma County	0

The undersigned, whose title is written below his signature, being the officer of the OKLAHOMA PLANNING AND RESOURCES BOARD OF THE STATE OF OKLAHOMA having custody of the records, files and documents of said Board does hereby certify that the foregoing seven typewritten pages is a true and correct copy of the original thereof on file in said Board, the original being the Permit, Grant, License and Certificate issued by said Board to the City of Tulsa, a municipal corporation, in relation to the application as amended and supplemented of said City of Tulsa for the appropriation of the waters of Spavinaw Creek Stream System, being file No. 22-23 of said Board.

Witness the hand of said officer, with the seal of said Board affixed, at his office, in Oklahoma City, Oklahoma, in the State Capitol Building, on this thirteenth day of September, A.D. 1938.

T. G. Gammie
Secretary

(SEAL)

EXHIBIT

C

IN THE DISTRICT COURT OF MAYES COUNTY, OKLAHOMA

CITY OF TULSA, a municipal corporation,

Plaintiff,

VS.

No. 5263

GRAND-HYDRO, a corporation, et al.,

Defendants.

D E C R E E

Now on this 10th day of February, 1938, the above styled cause came on regularly for hearing. The plaintiff appeared by its City Attorney, H. O. Bland, and by special counsel Harve W. Langley; the defendant Grand-Hydro, a corporation, appeared by its president and attorney of record W. E. Hudson; the City of Muskogee, a municipal corporation, appeared through its attorney William Bampendahl; the City of Wagoner, a municipal corporation appeared by its attorney W. O. Rittenhouse; the City of Pryor Creek, a municipal corporation, appeared by its attorney Ernest R. Brown; the Town of Fort Gibson, a municipal corporation, appeared by its attorney, Q. E. Boydston; the Oklahoma Hydro-Electric Company, a corporation, appeared by its attorney Wilbur J. Holliman; the Defendant T. C. Bowling appeared in person; Cedar Crest Lakes Company, an Oklahoma express trust, appeared by its attorney Maurice F. Ellison; the defendant Grand River Dam Authority appeared by its general counsel R. L. Davidson and its associate counsel Jack L. Rorschach; the State of Oklahoma and the Oklahoma Planning and Resources Board appeared through Randell S. Cobb, Assistant Attorney General of the State of Oklahoma; the City of Vinita, a municipal corporation, appeared by its attorney W. T. Eze; the City of Miami was not represented by attorney, having filed an answer that it did not now nor has it at any time past used any of the waters belonging to Grand River or any of its tributaries. All of the parties present announced ready for trial except the defendant Oklahoma Hydro-Electric Company, which asked for a postponement of the trial. The request was withdrawn under an agreement made in open court that after the other parties desiring to introduce evidence had closed their testimony, the

ATK 2082

Oklahoma Hydro Electric Company should have the privilege if it so desired at that time, of delaying the trial two days, for the purpose of amending its answer and introducing its evidence. Thereupon, the City of Tulsa, introduced its evidence, after which the defendants the City of Muskogee, The City of Wagoner, the City of Pryor Creek, the Town of Fort Gibson, the Grand-Hydro, Cedar Crest Lakes Company and T. C. Bowling and Grand River Dam Authority introduced their evidence. The introduction of evidence by all parties other than the Oklahoma Hydro Electric Company having been concluded the Oklahoma Hydro-Electric Company claimed its right under the agreement made in open court, to a delay of the trial for two days, which claim the court indicated would be allowed, but it was agreed in open court that further hearing of the cause would be continued until February 12, 1938, at 9:00 a.m., at which time the hearing of the cause would be resumed unless the Oklahoma Hydro-Electric Company at that time was not ready to proceed in which event, the further was to be further continued until February 14, 1938. Prior to convening of the court on February 12, 1938, the Oklahoma Hydro-Electric Company advised the Court that it would not be ready to resume the hearing of the cause on February 12th, but would be ready to resume the same on February 14th. Upon convening of the Court on February 12th, further hearing of the cause was continued by the Court until 5:00 o'clock P.M. February 14, 1938, and the further hearing of the cause was resumed at 5:00 o'clock P.M. on February 14, 1938, and the Oklahoma Hydro-Electric Company introduced its evidence and the Grand River Dam Authority and the Grand-Hydro introduced their rebuttal evidence.

Thereupon, the court having heard all the evidence, and the argument of counsel, and being fully advised in the premises finds and adjudges:

1. That Spavinaw Creek is a separate and distinct stream system from that of Grand River, although it is a tributary of Grand River; that the average flow of Spavinaw Creek is 450 cubic feet per second; that the City of Tulsa has actually appropriated to a beneficial use for municipal purposes, 45 cubic second feet per second of the flow of said creek; that there is now unappropriated in the flow of said creek 405 cubic second feet per second; that the City of Tulsa is diverting from the flow of said creek approximately 45 cubic second feet per second, and conveying the same through a conduit line to the City of Tulsa for municipal purposes; that the point of diversion is at the town of Spavinaw, where the City of Tulsa constructed a dam

impounding approximately 31,000 acre feet of water, and that the diversion of said water actually began in April 1924, which diversion has been continuous ever since; that on May 11, 1922, the City of Tulsa filed its application with the State Engineer of the State of Oklahoma for a permit to appropriate the minimum flow of said creek (45 cubic feet per second) to a beneficial use, to-wit; a municipal water supply, and on the 5th day of August, 1922, the City of Tulsa filed its amended application with the State Engineer of the State of Oklahoma for a permit to appropriate the minimum flow of said creek for the same purpose; that the State Engineer fixed a day certain for the hearing of said application and amended application, and directed that notice of said hearing to be given as provided by law; that due notice of said hearing was given, and on the 28th day of November, 1922, the State Engineer issued a permit to the City of Tulsa and approved its applications for the appropriation of the entire flow of said creek for municipal purposes; that thereafter the City of Tulsa, on March 23, 1932, filed with the Conservation Commission of Oklahoma an amendment to its applications seeking to appropriate the excess flow of Spavinaw Creek over and above the 45 cubic feet per second already applied for, to meet future needs of the City of Tulsa for waterworks purposes; that no person, firm or corporation, other than the City of Tulsa has ever applied for the right to appropriate the Waters of Spavinaw Creek to a beneficial use, or actually applied the waters of said creek to a beneficial use; that the City of Tulsa has been diligent in the appropriation of said waters for municipal use and purposes and has been diligent in the prosecution of its application for a permit to appropriate said waters for said purpose, and is prior in point of time to other persons, firms and corporations in making application to the proper authorities for such permit.

2. That on the 14th day of July, 1931, the defendant Grand-Hydro a domestic corporation, filed with the Conservation Commission of the State of Oklahoma its application in due form for a permit to appropriate 4,000 cubic feet per second of the flow of Grand River for the purpose of generating electricity energy and power; that the Commission fixed a day certain for the hearing of said application, and directed that notice of said hearing be given as provided by law; that said notice was duly given, and on the 29th day of August, 1931, the said Commission issued to the Grand-Hydro a permit to appropriate to a beneficial use (the generation of electric energy and power)

4,000 cubic feet per second of the flow of Grand River; that under the authority of said approved application, Grand-Hydro proceeded with diligence to acquire one or more dam sites for the purpose of constructing a dam to impound the waters of Grand River for use in the generation of electric energy and power, and in making extensive engineering investigations and surveys, and in the acquisition of lands in the basin area of the reservoir, which would be inundated by the impounded waters, but the court finds and adjudges that the Grand-Hydro did not construct any works or facilities through which to utilize the waters of said river for the purpose of generating electric energy or for any other beneficial use, and did not actually apply and has never actually applied or appropriated any of the waters of said river to a beneficial use, and does not now have any right to apply or appropriate any of the waters of said river to any beneficial use, but that if Grand-Hydro acquired any rights under its said approved application, it has transferred and conveyed the same to the Grand River Dam Authority by virtue of its assignment of January 10, 1938.

3. The Court further finds and adjudges that on the 20th day of February, 1932, the City of Pryor Creek filed its application with the Conservation Commission of Oklahoma for a permit to appropriate .375 cubic feet per second of the flow of Grand River to meet its present need for municipal waterworks purposes and .75 cubic feet per second of the flow of said river for its future needs; that the Commission fixed a day certain for the hearing of said application, and directed that notice thereof be given as provided by law; that such notice was duly given, and on the 14th day of April, 1932, the said Commission issued to the City of Pryor Creek its permit to appropriate for municipal purposes .375 cubic feet per second of the flow of said river for its waterworks system and began taking its water supply from Grand River in 1910, and has used the waters of Grand River for that purpose continuously ever since; that the point of diversion is near the northwest corner of Section 12, Township 20 North, Range 19 East, in Mayes County, Oklahoma.

4. The Court further finds and adjudges that on the 29th day of February, 1932, the City of Muskogee filed its application with the Conservation Commission for a permit to appropriate 30 cubic feet per second of the flow of Grand River for municipal purposes; that the Commission fixed a day certain for the hearing of said application and directed that notice thereof be given as provided by law; that such notice was duly given, and

on the 14th day of April, 1932, the said Commission issued to the City of Muskogee a permit to appropriate 30 cubic feet per second of the flow of said river for municipal purposes; that the City of Muskogee began using the water of Grand River for municipal purposes prior to statehood and at statehood was using said waters at the rate of 5 cubic feet per second, and has continuously used the same for such purposes ever since, and is now using the waters of said river for such purpose to the extent of 25 cubic feet per second; that the point of diversion by the City of Muskogee is approximately 1300 feet above the confluence of Grand River with the Arkansas River; that the waterworks system of the City of Muskogee was constructed and operated prior to statehood and has been operated in its present condition since 1913.

5. The Court further finds and adjudges that on March 3, 1932, the City of Vinita filed its application with the Conservation Commission for a permit to appropriate 5 cubic feet per second of the flow of Grand River for municipal purposes; that the Commission fixed a day certain for the hearing of said application, and directed that notice be given thereof as provided by law; that such notice was duly given and on the 8th day of April, 1932, said Commission issued to the City of Vinita a permit to appropriate 5 cubic feet per second of the flow of Grand River for municipal purposes; that the said City constructed its waterworks system and began the diversion of 5 cubic feet per second of the flow of said river for municipal purposes in 1922, at a point on said river in Section 2, Township 23 North, Range 21 East, in Mayes County, Oklahoma, and has ever since continuously used the waters of said river for municipal purposes to that extent.

6. The Court further finds and adjudges that on the 9th day of March, 1932, the City of Wagoner filed its application with the Conservation Commission for a permit to appropriate 4 cubic feet per second of the flow of Grand River for municipal purposes; that the said Commission fixed a day certain for the hearing of said application, and caused notice of said hearing to be given as provided by law, and on the 14th day of April, 1932, said Commission issued to the City of Wagoner a permit to appropriate four cubic feet per second of the flow of Grand River for municipal purposes; that the said City began using said waters of said river for such said municipal purposes

prior to statehood, and at the time of statehood was using said waters at the rate of 2 cubic feet per second for present needs, and has asked in its application for an additional 2 cubic feet per second for its future needs; that the diversion of said waters from said river by the City of Wagoner began in 1903 and has been continuous ever since; that the point of diversion is located 534 feet north and 890 feet east of the southwest corner of the Northwest Quarter (NW $\frac{1}{4}$) of Section 20, Township 18 North, Range 19 East of the Indian Base and Meridian, in Wagoner County, Oklahoma.

7. The court finds and adjudges that on the 24th day of March, 1932, Cedar Crest Lakes Company, an Oklahoma Express Trust, filed its application with the Conservation Commission for a permit to appropriate 500 acres feet of the flow of Spring Creek, a tributary of the Grand River in Mayes County, for the purpose of recreation and fish culture; that the said Commission fixed a day certain for the hearing of said application, and caused notice thereof to be given as provided by law, but that no permit was ever issued to Cedar Crest Lakes Company by the Commission, nor has any further action been taken on said application; that during the year 1932 the Cedar Crest Lakes Company constructed a dam across Spring Creek inundating 110 acres of land located in Section 34, Township 19 North, Range 19 East, and Sections 18 and 19, Township 19 North, Range 20 East, in Mayes County, Oklahoma, and has continuously maintained said dam to this date, and devoted the water thus impounded to recreation and fish culture.

8. The court finds and adjudges that long before statehood the Town of Fort Gibson began using the waters of Grand River for municipal purposes, and on the advent of statehood was using 1.543 cubic feet per second of the flow of said river for such purposes, and is now and has been continuously since statehood, using 1.543 cubic feet per second of the flow of said river for such purposes, but has never filed any application with the State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, for a permit to appropriate any of the waters of said River for municipal or other beneficial use; that the point of diversion is located in Section 2, Township 15, North, Range 19 East, in Muskogee County, Oklahoma.

9. The court further finds and adjudges that on June 19, 1922, the Grand River Hydro Electric Company, a corporation, filed its application with the State Engineer for a permit to appropriate the entire flow of Grand River at a point located 1154 feet north and 87 feet west of the Southeast

corner of Section 15, Township 23 North, Range 21 East, in Mayes County, Oklahoma, Dam No. 1, for the purpose of generating electric energy and power; that the State Engineer fixed a day certain for the hearing of said application, and directed that notice thereof be given as provided by law; that such notice was duly given and on the 23rd day of September, 1922, the State Engineer endorsed on said application his approval thereof; that on June 18, 1923, the Grand River Hydro-Electric Company, a corporation, filed its applications (3) with the State Engineer to appropriate the entire flow of Grand River for the purpose of generating electric energy at three points on the river (for dam No. 2 at a point located 2640 feet north and 1320 feet west of the Southeast Corner of Section 4, Township 21 North, Range 20 East, in Mayes County; and for Dam No. 4 at a point located 2640 feet south and 650 feet West of the northeast corner of Section 22, Township 17 North, Range 19 East, in Cherokee and Wagoner counties); that the State Engineer fixed a day certain for the hearing of said applications, and caused notice thereof to be given as provided by law, and on July 1, 1924, endorsed on said applications his approval thereof; that the Oklahoma Hydro-Electric Company has acquired by messe assignments and transfers, whatever rights the Grand River Hydro-Electric Company ever had or possessed by virtue of filing of said applications and the State Engineer's approval thereof, but the Court finds and adjudges that neither the Grand River Hydro-Electric Company nor the Oklahoma Hydro-Electric Company, nor any other person, firm or corporation claiming rights under the approved applications of Grand River Hydro-Electric Company, ever constructed any works or facilities through which to use any of the waters of said river for the purpose of generating electric energy or for any other beneficial use; that neither the said Grand River Hydro-Electric Company nor the Oklahoma Hydro-Electric Company, nor any one claiming rights under the approved applications of the Grand River Hydro-Electric Company used due diligence in the appropriation of the waters of said river, to a beneficial use, or used due diligence in prosecuting said applications, or any of them, and that the Grand River Hydro-Electric Company and its assignees, including the Oklahoma Hydro-Electric Company, have abandoned the proceedings instituted by the Grand River Hydro-Electric Company to acquire the right to appropriate the waters of said river to a beneficial use; that the Grand

River Hydro-Electric Company failed to pay its corporation license taxes, for which reason its charter was forfeited by the State in 1934, and it ceased to be a corporation and does not now and has not since 1934 possessed any corporate powers, but the Court finds that before the forfeiture of the charter, the Grand River Hydro-Electric Company assigned and conveyed all of its rights to the persons who later transferred and assigned such rights to the Oklahoma Hydro-Electric Company, and the Court finds and adjudges that the Oklahoma Hydro-Electric Company, has no right to appropriate any of the waters of the Grand River to any beneficial use, and that no person, firm or corporation has any right to appropriate any of the waters of Grand River to any beneficial use under or by virtue of the approved applications of the Grand River Hydro-Electric Company; that if any rights ever existed under said approved applications, they have been abandoned and forfeited and ceased to exist prior to the enactment of Article 4, Chapter 70, of the 1935 Session Laws of the State of Oklahoma, creating the Grand River Dam Authority and appropriating to it the entire flow of the Grand River and conferring upon it the right to control, store, preserve and use the waters of said river for the beneficial purposes specified in said Act.

10. The Court further finds and adjudges that the Oklahoma Hydro-Electric Company has never applied to the State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, or any other state authority, for any permit to appropriate any of the waters of Grand River to a beneficial use, and has never actually applied or appropriated any of said waters to a beneficial use, and does not now have any right to appropriate any of the waters of said river to a beneficial use.

11. The Court finds and adjudges that the City of Miami has never applied to the State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, or any other state authority for a permit to appropriate any of the waters of Grand River to a beneficial use, and has never actually applied or appropriated any of the waters of said river to a beneficial use, and does not now have any right to appropriate any of the waters of said river to a beneficial use.

12. The Court finds and adjudges that on September 25, 1931, the defendant T. C. Bowling filed his application with the Conservation Commission for a permit to appropriate 550 acre feet of the flood flow of

Mayes Branch, a tributary of Grand River in Mayes County, Oklahoma, for the purpose of fish culture and irrigation, and on February 20, 1932, the said defendant filed with said Commission an amended application for a permit to appropriate 550 feet of the flow of said Mayes Branch for the same purposes; that the said Commission fixed a day certain for the hearing of said application and amended application, and caused due notice thereof to be given as provided by law; that on March 26, 1932, the said Commission issued to said defendant a permit to appropriate the said 550 feet of the flow of Mayes Branch for said purposes; that the said defendant on or about the 26th day of March, 1932, constructed a concrete core wall and earthen dam across said Mayes Branch and inundated about 30 acres of land, and has continuously maintained said dam to this date, devoting the waters so impounded to the culture of fish and the irrigation of shrubbery trees and garden spot on adjacent land.

13. The Court further finds and adjudges that all of said permits for the appropriation of the waters of Grand River and Spavinaw Creek were prematurely issued because no hydrographic survey of the stream system of the Grand River or Spavinaw Creek had ever been made and filed as required by law, and no judicial determination by a court of competent jurisdiction of the appropriated and unappropriated waters of said Grand River or Spavinaw Creek had ever been had; that a hydrographic survey of the stream system of the Grand River was made by the Oklahoma Planning and Resources Board and filed in this cause on February 10, 1938, and that no adjudication by any court of competent jurisdiction of the appropriated and unappropriated waters of the stream system of Grand River has ever been made heretofore; that no vested right to appropriate any of the waters of Grand River to a beneficial use have accrued to any parties to the cause except the Grand River Dam Authority since statehood; that no person, firm or corporation ever appropriated or applied the waters of Grand River or Spavinaw Creek to beneficial use prior to statehood, other than the Town of Fort Gibson to the extent of 1.543 cubic feet per second, the City of Wagoner to the extent of 2 cubic feet per second, and the City of Muskogee to the extent of 5 cubic feet per second; that said three cities have an equal right to use the waters of Grand River for municipal purposes to the extent adjudged herein, which right is prior and superior to the rights of all other parties to that extent.

14. The Court further finds and adjudges that no person, firm or corporation other than the Grand River Dam Authority has acquired since statehood the right to appropriate any of the waters of Grand River to a beneficial use; that Article 4 of Chapter 70 of the 1935 Session Laws of the State of Oklahoma, which became effective on the 29th day of July, 1935, appropriated to and vested in the Grand River Dam Authority the absolute right to control, store and preserve the waters of Grand River for the purposes set forth in said Act, including the generation of electric energy, irrigation, recreation and the prevention of damage to persons and property from the flood waters of said river, and operated as an appropriation of all of the waters of Grand River to the Grand River Dam Authority for the purposes therein specified, subject only to the right of the Town of Fort Gibson to use for municipal purposes 1.543 cubic feet per second of the flow of said river, the right of the City of Wagoner to use 2 cubic feet per second of the flow of said river for municipal purposes, and the right of the City of Muskogee to use 5 cubic feet per second of the flow of said river for municipal purposes, at the points of diversion hereinbefore adjudged; that the right of the Grand River Dam Authority to appropriate the waters of Grand River is prior and superior to the rights of the City of Vinita, the City of Pryor Creek, the City of Miami, T. C. Bowling, Cedar Crest Lakes Company, the Oklahoma Hydro-Electric Company, the Grand River Hydro-Electric Company, the Oklahoma Planning and Resources Board, and all other persons, firms, and corporations save and except the Town of Fort Gibson, the City of Wagoner and the City of Muskogee to the extent hereinbefore adjudged, and that the right of the Grand River Dam Authority to appropriate the waters of Grand River is prior and superior to the rights of the Town of Fort Gibson, the City of Wagoner and the City of Muskogee to appropriate the waters of said river in excess of 1.543 cubic feet per second for the Town of Fort Gibson, 2 cubic feet per second for the City of Wagoner, and 5 cubic feet per second for the City of Muskogee, and, the Court further finds and adjudges that the Act creating the Grand River Dam Authority is a legislative appropriation to the Grand River Dam Authority of all the waters of the Grand River and its tributaries in Oklahoma, except 1.543 cubic feet per second in favor of the Town of Fort Gibson, 2 cubic feet per second for the City of Wagoner and 5 cubic feet per second for the City of Muskogee, and that it is unnecessary for the Grand River Dam Authority to apply to the Oklahoma Planning and Resources Board

for a permit to appropriate the waters of Grand River to a beneficial use or secure from the Oklahoma Planning and Resources Board a permit or license to appropriate said waters to a beneficial use, or to construct works or facilities for use in applying said waters to a beneficial use; that no person, firm or corporation other than those hereinbefore mentioned, has ever applied for the right to appropriate or actually appropriated the waters of said River to a beneficial use.

15. The Court further finds and adjudges that the Grand River Dam Authority has declared its intention to construct and is now engaged in constructing a dam approximately 147 feet in height, across the Grand River near the Town of Pensacola, in Mayes County, Oklahoma; that said dam will impound at the power pool level 1,600,000 acre feet of water, and at the flood pool level 2,200,000 acre feet of water; that the Grand River Dam Authority has declared its intention and is proceeding to construct in connection with the said dam, a hydro-electric power plant with an installed capacity of 60,000 K.W., through which will pass during the operation of the plant, water varying from 1,000 to 6,000 cubic feet per second; said dam to be equipped with flood gates to control the flood waters of said river and with a sluice gate 10 feet square in the lower part of the dam structure, through which the waters of the river may be discharged at any time.

16. The court further finds and adjudges that at the Pensacola dam site the average flow of the Grand River is 6300 cubic feet per second, and that at the mouth of said river the average flow of the stream is 8400 cubic feet per second; that the run-off of the water shed of the Grand River below the Pensacola dam site is more than sufficient to supply the needs of the City of Fryer Creek, the City of Wagoner, the City of Muskogee and the Town of Fort Gibson, which take their water supply from the Grand River below the Pensacola dam site, and that the construction and operation of the Grand River dam and hydro-electric power plant by the Grand River Dam Authority will maintain in the channel of the Grand River below the Pensacola dam site, a very much larger flow during dry periods than now exists; that the control of the flood waters of Grand River through operation of the flood gates of said dam, will protect the waterworks facilities of said cities from inundation during flood periods; that the construction and operation of said dam by the Grand River Dam Authority will substantially aid in preventing the waters of the Arkansas River from entering the intake of the Muskogee waterworks system; that the construction and operation of said dam and hydro-electric power plant will materially benefit

the municipalities using the waters of Grand River for municipal purposes, by maintaining in said river a regular flow of water and providing them a better quality of water for their consumption; that the City of Vinita takes its supply of water for municipal purposes from the Grand River above the Pensacola Dam Site.

17. the Court further finds and adjudges that neither the Oklahoma Hydro-Electric Company, the Grand River Hydro-Electric Company, the Grand Hydro, nor Clontz & Sosarth, have any rights to any of the waters of Grand River or its tributaries, and have never appropriated or applied any of the waters of said stream or its tributaries to a beneficial use.

18. The Court further finds and adjudges that subject to the prior right of the Town of Fort Gibson to divert and appropriate for municipal purposes 1.5⁴³ cubic feet per second of the flow of Grand River, and of the City of Wagoner to divert and appropriate for municipal purposes 2 cubic feet per second of the flow of Grand River, and of the City of Muskogee to divert and appropriate for municipal purposes 5 cubic feet per second of the flow of Grand River, and the prior right of the Grand River Dam Authority to appropriate all of the remaining flow of the Grand River for the purposes set forth in the act creating the Grand River Dam Authority, the priorities of the parties hereto in the matter of making application to the proper authorities for a permit to appropriate the waters of Grand River to a beneficial use since statehood, are as follows and for the following purposes and to the following extent:

- (1) The City of Pryor Creek to the extent of .375 cubic feet per second for its present municipal needs, and .75 cubic second feet for its future needs.
- (2) The City of Muskogee to the extent of 30 cubic feet per second feet for municipal purposes;
- (3) The City of Vinita to the extent of 5 cubic feet per second for municipal purposes;
- (4) The City of Wagoner to the extent of 4 cubic feet per second for municipal purposes;
- (5) T. C. Bowling, the waters of Mayes Branch, a tributary of Grand River, to the extent of 550 acre feet for fish culture and irrigation;
- (6) Cedar Crest Lakes, 500 acre feet of the flow of Spring Creek, a tributary of Grand River in Mayes County, Oklahoma, for recreation and fish culture.

19. It is further ordered and adjudged by the Court that the total costs of this action are hereby taxed at \$150.00, of which said sum the plaintiff of the City of Tulsa will pay \$75.00, and the Grand River Dam

Authority \$50.00, the City of Muskogee \$15.00, and the Town of Fort Gibson and City of Wagoner each \$5.00.

20. The defendants Oklahoma Hydro-Electric Company, City of Muskogee, City of Wagoner, City of Pryor Creek, City of Vinita, City of Miami, Town of Fort Gibson, Cedar Crest Lakes Company and T. C. Bowling, each excepts to the Court's findings and decree, which exceptions are hereby allowed by the Court.

RENDERED IN OPEN COURT this 14th day of February, 1938.

N. B. JOHNSON, JUDGE

(ENDORSED): No. 5263. In the District Court of Mayes County, Oklahoma. City of Tulsa, a municipal corporation, Plaintiff, vs. Grand-Hydro, a corporation, et al., Defendants. Decree. Filed in the District Court Mayes County, Oklahoma, February 10, 1938, R. A. DeLozier Court Clerk, by _____ Deputy. Recorded in Civil Journal No. 16, at page D. 82-83-84-85-86-87-88-89."

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INVESTMENT IN WATERWORKS PROPERTYCITY OF TULSA, OKLAHOMAWATERWORKS BONDS

WATERWORKS OF 1911	\$98,000.00
WATERWORKS OF 1916	50,000.00
WATER FILTRATION OF 1916	180,000.00
WATER PUMP STATION of 1917	15,000.00
WATER PUMP & MAINS of 1917	660,000.00
WATERWORKS OF 1921	200,000.00
PRELIMINARY WATER SURVEY of 1921	25,000.00
WATERWORKS OF 1922	\$6,800,000.00
WATERWORKS OF 1924	700,000.00
WATERWORKS OF 1925	500,000.00
RED FORK WATERWORKS OF 1917	20,000.00
RED FORK WATERWORKS OF 1921	19,000.00
RED FORK WATERWORKS OF 1925	50,000.00
CARBONDALE WATERWORKS OF 1926	35,000.00
WATERWORKS OF 1935	25,000.00
<u>TOTAL WATERWORKS BONDS</u>	<u>\$9,369,000.00</u>

ATK 2095

INVESTMENT IN WATERWORKS PROPERTY
CITY OF TULSA, OKLAHOMA

CAPITAL INVESTMENT FOR WATERWORKS IMPROVEMENT WITH
FUNDS DERIVED FROM WATER DEPARTMENT REVENUE
BY YEARS

1921	\$ 106,109.00
1922	112,628.00
1923	197,965.00
1924	178,095.00
1926	330,586.00
1927	505,130.00
1928	489,372.00
1929	389,511.00
1930	299,531.00
1931	603,404.00
1932	303,074.00
1933	45,705.00
1934	17,157.83
1935	3,002.80
1936	40,365.65
1937	28,779.94
	43,817.98
TOTAL IMPROVEMENTS FROM REVENUE	\$3,694,297.00

SUMMARY

Capital Improvements from Bonds	\$9,369,000.00
Capital Improvements from Water Department Revenue	<u>3,694,297.20</u>
<u>TOTAL</u>	<u>\$13,063,297.20</u>

WATER DELIVERED INTO SPAVINAW CONDUITOCTOBER 21, 1921, to JULY 1, 1938 by YRS.YEARMILLION GALLONS

1924
1925
1926
1927
1928
1929
1930
1931
1932
1933
1934
1935
1936
1937
1938

1.775
9.125
9.125
9.125
9.125
9.125
9.125
9.125
9.125
9.125
9.125
9.125
9.125
9.125
9.125
9.125

TOTAL

121,963

See Note

on

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Certified Copy

STATE OF OKLAHOMA)
) SS
COUNTY OF MAYES)

CERTIFICATE OF TRUE COPY

I, R. A. DeLOZIER, the duly qualified, elected and acting Court Clerk in and for said County and State, do hereby certify that the annexed and foregoing instrument is a full, true and correct copy of the original Judgment rendered on the 14th day of February, 1938, in the action styled: City of Tulsa, plaintiff, vs. Grand-Hydro, et al., Defendants, No. 5253 in the District Court of said County, (and from said judgment no appeal was perfected) as the same appears of record and on file in my said office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal at Pryor, Oklahoma, this 1st day of November, 1938.

R. A. DeLOZIER
Court Clerk

By Lucille Utley
Deputy

(SEAL)

ATK 2099